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NO. 79-5962

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

DANNY VINCENT,

Appellant

V.

THE STATE OF TEXAS,

Appellee

On Appeal From The
Texas Court of Criminal Appeals

BRIEF FOR APPELLEE

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QUESTIONS PRESENTED

1.(a) Whether Appellant Vincent was deprived of due process of law when his probation was revoked at a full and fair hearing that was not preceded by a preliminary hearing?

(b) If so, whether this Court should hold the Texas felony probation statute unconstitutional for its failure to establish an arrested probationer's right to a preliminary hearing; or, alternatively, for its failure to require that arrested probationers must be informed of their statutory right to a revocation hearing within twenty days after one is requested?

2.(a) Whether any error in wrongfully depriving Appellant Vincent of a preliminary hearing was rendered harmless by his subsequent full and fair revocation hearing that is presently unchallenged on any ground?

(b) If not, whether the Court's holding should apply retroactively?

3. Whether this appeal should be dismissed for Appellant Vincent's failure to file notice of appeal "with the clerk of the court possessed of the record" as required by former Sup. Ct. R. 11(1)?

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On Appeal From The
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BRIEF FOR APPELLEE

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES The State of Texas, Appellee herein, and in response to the Brief of Appellant Danny Vincent, would show the Court the following:

THE OPINION BELOW

The unpublished per curiam opinion of the Texas Court of Criminal Appeals is *Vincent v. State*, No. 60,564 (Tex.Crim.App., Sept. 19, 1979), and is set forth at

A.38.[1] *See* Table, 586 S.W.2d 880.

JURISDICTION

Appellant Vincent seeks to invoke jurisdiction under 18 U.S.C. §1253(2). (Brief for Appellant at 2.). Under 28 U.S.C. §1257(2), jurisdiction would be proper to review the constitutionally based judgment of the Texas Court of Criminal Appeals, except that Vincent has failed to comply with former Sup. Ct. R. 11(1), 28 U.S.C. (1970). That rule requires that notice of appeal must be filed with the court possessed of the record within ninety days after final judgment. Vincent has never complied with this requirement because he has never filed notice of appeal with the Texas Court of Criminal Appeals -- the court "possessed of the record" -- but only with the state trial court. (*See* the discussion in the Argument, Part III below). Therefore, the Court should not exercise jurisdiction over this cause.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner cites and sets forth a portion of the Fourteenth Amendment to the United States Constitution, as well as Tex. Code Crim. Proc. Ann. arts. 26.04(b), 40.09, sec. 1, and 42.12, secs. 3(b), 8(a). For the convenience of the Court, the entire Texas felony probation statute, Tex. Code Crim. Proc. Ann. art. 42.12, secs. 1-11, is set forth in the supplement to this brief.

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[1]Appellee will refer to the separately bound appendix as "A". The record on appeal is composed of a transcript, consisting of all pleadings, motions, and orders, and a statement of facts, which is the record of the actual revocation of probation hearing in question-and-answer form. The former will be referred to as "Tr."; the latter, as "R." Where an item appears in both the appendix and the transcript, only the former citation is provides.

Also involved is former Sup. Ct. R. 11(1), 28 U.S.C. (1970):

> An appeal to review the judgment of a state court of last resort in a criminal case shall be deemed in time when notice of appeal prescribed by Rule 10 is filed with the clerk of the court possessed of the record within ninety days after the entry of such judgment and the case is docketed within the time provided in Rule 13.

STATEMENT OF THE CASE

On May 23, 1977, in the 84th Judicial District Court of Ochiltree County, Texas, Appellant Danny Vincent pled guilty to the offense of burglary of a habitation. (A.3). His punishment was assessed on that day as a two thousand dollar fine and imprisonment for six years in the Texas Department of Corrections. (A.5). The imposition of sentence was suspended, however, and Vincent was placed on probation. (A.8). Among the conditions of probation were the requirements that he "commit no offense against the laws of this or of any other state or of the United States;" that he "avoid injurious or vicious habits;" that he "refrain absolutely from drinking intoxicants in all forms;" that he pay a small probation fee regularly and make restitution to the victim of his crime, provided that he was financially able to do so; and that he make written monthly reports to his probation officer concerning his employment. (A.10). Vincent's probation officer discussed all these conditions with Vincent. (R. 6-7, 92). He swore to obey them all. (A.10).

Approximately four months later, on October 3, 1977, the district attorney and a probation officer filed a motion for a warrant to arrest Vincent for the purpose of revoking his probation, alleging that on September 28, 1977, he had committed the criminal offenses of trespass and possession of marijuana. (A.12). Vincent was

arrested upon the resultant warrant and apparently remained in jail until October 18, 1977, when he signed and submitted a motion for release to the Court. (A.14). The same day, the trial judge signed an order granting his release and continuing him upon probation with the added conditions that he report weekly to his probation officer, that he "not associate with anyone known to use or to have used drugs of any type," and that he appear at any subsequent revocation hearing. (A.15, R.35). Again Vincent swore to obey these conditions. (A.14).

Less than four months later, on the evening of February 3, 1978, Jack Nelson, a Perryton, Texas, police officer, observed Vincent driving his car in an irregular manner. (R. 41-43). Nelson had some difficulty in getting Vincent to pull his vehicle over to the side of the road. (*Id.*). When Vincent finally did so and got out of his car, Nelson observed:

> [H]is hair was a little messed up. He was glassy eyed and he propped up against the car and also smelled alcohol on his breath.

(R.45). Vincent told Nelson that he was on probation (R.47) and that he had been drinking beer. (R.83). Vincent, in fact, testified at his eventual revocation hearing that he had been drinking beer for "[s]even or eight hours" before his arrest. (*Id.*). Nelson arrested him for driving while intoxicated (R.49), and called Jeff Hooper, Vincent's probation officer,to meet him at the Perryton police station (R.47), where he then transported Vincent.

Hooper met Vincent and Nelson within minutes of their arrival at the police station. (R.49). He discussed the arrest with Nelson (R.29), and gave Vincent his *Miranda* warnings. (R.31). He then spent thirty to forty minutes with Vincent (R.13), observing the following:

> His eyes were bloodshot, he had alcohol odor on his breath, he was very talkative. . .His

> walking, he seemed to sway a little bit when he walked, slow steps. . .His speech was slurred.

(R.14). Hooper stated that in his experience -- which included a Bachelor of Science degree in criminal justice, a year as chief of police in another Texas city (R.17), and extensive work as a probation officer with "people who have alcoholic problems" (*Id*) -- Vincent was intoxicated. (R.20).

Officer Nelson's observations at the police station during this time corroborated Hooper's:

> [Vincent] was very talkative. His walk was kind of a weave and he was very slow in walking. . .[His walk] was slow and hesitant. He was unsure of himself.

(R.50). As he had concluded before the arrest, Nelson was convinced Vincent "was under the influence" of intoxicants. (R.52).

Three days later, on February 6, 1978, the district attorney and a probation officer filed a supplementary motion for Vincent's arrest and to revoke his probation. (A.16). The motion alleged that Vincent had broken four conditions of his probation in that he had committed the criminal offense of driving while intoxicated, had failed to refrain from drinking intoxicants, had failed to pay his probation fees for two months, and had failed to submit his written monthly employment report in January, 1978. (A.16-17).

Vincent was apparently released that weekend, but was rearrested on February 6, 1978, (A.21), and remained in jail until March 27, 1978, when he was released on bond. (R.23,74,80,112). Meanwhile, on approximately February 17, 1978, Vincent had a discussion with Jeff Hooper in the jail. Hooper advised him to retain an attorney if he didn't already have one. (R.77). At some point, Vincent contacted Danna Kay Archer, the attorney who had represented him during

the earlier burglary proceedings ending in probation. (A.3,5,8). He contacted Archer twice himself (R.92), talking to her on the telephone on one occasion (R.76), and other discussions were held with her by other persons on his behalf (R.92). Vincent didn't know that Archer was not going to represent him in the revocation of probation proceedings until shortly before he talked to his eventual and present attorney, Robert D. McCutcheon, on March 15, 1978. (*Id.*).

On March 2, 1978, a notice setting a hearing for March 27, 1978, to determine why probation should not be revoked was filed with the court (A.24-25). The record does not reflect whether the State, Vincent, or the court sua sponte instigated this setting. The trial court formally appointed Robert McCutcheon counsel for Vincent on March 24 (Tr.22; Brief for Appellant at 5), although McCutcheon and Vincent had met on March 15, 1978. (R.76). The court on March 27 also heard formal prehearing motions (Tr.17-20), and ordered Vincent's bond reduced from $7500.00 to $5000.00. (Tr.24). The record contains no original bond setting.

A formal revocation hearing was held before the 84th District Court of Ochiltree County, Texas, on April 10, 1978. Three witnesses, including probation officer Hooper and Jack Nelson, the arresting police officer, testified for the State of Texas, and three witnesses, including Vincent, testified for the defense. Vincent admitted at the hearing, as he had to the arresting police officer weeks earlier, that he had violated the terms and conditions of his probation by drinking and driving. (R.83-84). His explanation for this conduct was as follows:

> Well, I had -- I was sort of talked into it and that and stresses and strains, it was a release type. I couldn't cope with what was happening to me so I had to find some way out of it.

(R.84).

Vincent's probation was revoked by the trial judge of the 84th District Court on June 5, 1978, for driving while intoxicated. (A.28). On July 11, 1978, he was sentenced by the court to serve six years in the Texas Department of Corrections. (A.32-33). On August 2, 1978, his appeal bond was increased from $2000.00 to $12,000.00. The record does not reflect how or when his bond had been reduced from its earlier $5000.00 setting.

Vincent appealed to the Texas Court of Criminal Appeals, challenging his probation revocation primarily on the ground that he was denied due process of law in failing to receive a preliminary hearing prior to his revocation hearing. He further alleged that Tex. Code Crim. Proc. Ann. art. 42.12, sec. 8, is unconstitutional for failing to provide such a preliminary hearing.

The Texas Court of Criminal Appeals affirmed the revocation in *Vincent v. State*, No. 60,564 (Tex.Crim.App., Sept. 19, 1979), an unpublished opinion (A.38). *See* Table, 586 S.W.2d 880. A motion for rehearing was denied on October 10, 1979. This appeal followed.

SUMMARY OF ARGUMENT

I. The historical, statutory, and case law development of probationers' rights in Texas has always paralleled or exceeded this Court's pronouncements as to the procedural and substantive process that is due parolees and probationers under the United States Constitution. The Texas Court of Criminal Appeals has consistently accorded Texas probationers more procedural due process rights than mandated by this Court in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). The Texas Legislature and the Court of Criminal Appeals have fashioned probation revocation procedures in Texas that have consistently been thought to go further than the minimal constitutional requirements. This Court, especially in light of its

previous admonitions that the states should have flexibility to develop their own procedures for according due process of law to arrested probationers, should endorse the Texas procedures.

It is true that appellant Vincent received no preliminary hearing after his arrest for violating the conditions of his probation and before his revocation hearing. But the primary purpose of a preliminary hearing, a judicial determination of probable cause to prevent lengthy pretrial incarceration on an insubstantial basis, was fulfilled by other features of Texas law. Vincent was arrested by a police officer for driving while intoxicated. He admitted to the officer that he was on probation and had been drinking. His probation officer met with him minutes after his arrest and determined that Vincent was in violation of the conditions of his probation. A warrant for Vincent's arrest was then issued by a Texas judge after the presentation of some evidence by state authorities. After he was incarcerated, Vincent failed to avail himself of his statutory right to a revocation hearing within twenty days, even though he had free access to attorneys during the time he was in jail. He was, in fact, released on bond prior to his eventual revocation hearing, at which he was represented by appointed counsel and accorded an unchallenged full and fair opportunity to argue that he should be continued on probation, in spite of his obvious violation of the conditions of probation. All these procedures, especially in light of the existing procedures in other jurisdictions, are ample to show that Vincent has not been denied due process of law.

In the alternative, the Texas probation revocation statute should not be declared unconstitutional for failure to afford probationers a preliminary hearing. Instead, if there is a constitutional defect in the Texas statutes, it is only that there is no requirement that arrested probationers be informed of their right to a full revocation hearing within twenty days after one is

requested. Such a holding should mark the limits of this Court's incursion upon Texas probation procedures.

II. Vincent complains that he was denied a preliminary hearing to establish probable cause. If the pre-hearing procedures were insufficient to substitute for that determination, then Texas argues that the error was rendered harmless in light of the subsequent full and fair revocation hearing. It would be pointless in the extreme to remand this cause for a determination of probable cause when Vincent was found guilty of violating the conditions of his probation upon a preponderance of the evidence at his actual hearing on the merits. Vincent could not have been prejudiced by the past failure to have determined that there was probable cause to arrest him because the outcome of his revocation hearing indisputably establishes that such a minimal burden would easily have been met. Clearly Vincent's present incarceration is not a result of any past wrong.

Any decision adverse to Texas should be applied prospectively only. Texas and other states have in many cases refused to accord preliminary hearings to arrested probationers where adequate procedural substitutes have been provided. Thousands of incarcerated probation offenders should not be released where the states have erroneously believed in good faith that they were complying with all constitutional requirements.

III. This appeal should be dismissed because Vincent failed to comply with former Sup. Ct. R. 11(1), requiring that notice of appeal to this Court be filed in the court possessed of the record within ninety days after judgment. In this case, the court possessed of the record, as well as the court rendering the final judgment from which Vincent seeks to appeal, is the Texas Court of Criminal Appeals, the highest Texas court with criminal jurisdiction. Instead, Vincent filed notice of appeal in the state convicting trial court, which was

neither possessed of the complete record nor the source of the judgment from which he now seeks to appeal. In light of the policies of Rule 11, this Court should now dismiss the appeal for want of jurisdiction to entertain it.

ARGUMENT

I.

TEXAS PROBATION REVOCATION PROCEDURES ARE CONSTITUTIONAL AND DENIAL OF A PRELIMINARY HEARING DID NOT DEPRIVE APPELLANT VINCENT OF DUE PROCESS OF LAW.

A. Texas Probation Revocation Procedures Exceed the Due Process Requirements of the Fourteenth Amendment.

1. The judicial and legislative development of the due process and statutory rights of probationers in Texas has always paralleled or exceeded the development of probationers' due process rights in this Court.

The federal law

Federal constitutional development of the due process rights of probationers is a comparatively recent phenomenon. The modern concept of probation, in fact, was unknown to the common law, although English courts historically had "a sentencing discretion that varied from era to era in British history." Cohen, *Sentencing, Probation and the Rehabilitative Ideal: The View From Mempa v. Rhay*, 47 Tex. L. Rev. 1, 18 (1968). Modern probation practices derived from the common law practice of suspending the sentences of persons who were pregnant, insane, pardoned by the crown, or not the same person as convicted by the jury. Note, 5 Tex. Tech. L. Rev. 833, 834 (1974), *citing* 4 W. Blackstone, Commentaries 396. *See Ex parte United States*, 242 U.S. 27, 44-45 (1916).

Although some commentators believe that probation may have been used as early as 1681 in the American colonies, A. Campbell, Law of Sentencing, §11 at 51-52 (1978), *citing* S. Rubin, the Law of Criminal Corrections, 176-77 (1963), it was not employed systematically until at least 1850. 8 Gonzaga L. Rev. 110 (1972). Massachusetts promulgated the first American probation statute in 1878. Campbell, §11 at 52 n. 51. It was this Court's holding in *Ex parte United States*, 242 U.S. 27 (1916), to the effect that there is no inherent judicial power to probate sentences, that led to enactment in 1925 of the first federal probation law, Act of Mar. 4, 1925, ch. 521, 43 Stat. 1259-61 (currently 18 U.S.C. §3651). Comment, 11 Hous. L. Rev. 895, 896 (1974); *see Roberts v. United States*, 320 U.S. 264 (1943).

In 1932 the Court held that probationers have few, if any, due process rights or procedural protections, *Burns v. United States*, 287 U.S. 216 (1932). The primary basis of the decision was that probation is a privilege, not a right, and consequently its revocation was viewed as a matter within the discretion of the trial court. *Id.* at 220-22. This holding was reaffirmed three years later in *Escoe v. Zerbst*, 295 U.S. 490, 492 (1935), which characterized probation as an "act of grace."

In *Mempa v. Rhay*, 389 U.S. 128 (1967), the unanimous Court, speaking through Mr. Justice Marshall, drastically altered the status of probationers in the eyes of the Constitution. The Court noted that *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Hamilton v. Alabama*, 368 U.S. 52 (1961), *Moore v. Michigan*, 355 U.S. 155 (1957), and *Townsend v. Burke*, 334 U.S. 736 (1948), "clearly stand for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempa*, 389 U.S. at 134. Consequently, while applauding Washington's sentencing proceeding as "an enlightened step forward," the Court decided "that a lawyer must be afforded at this proceeding whether it is labeled a

revocation of probation or a deferred sentencing." *Id.* at 137.

In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Court for the first time accorded substantial due process protections to parolees threatened with revocation. Reasoning that parolees have some liberty interest in their status such that its "termination calls for some orderly process, however informal," *id.* at 482, the Court established a two-step process. First, primarily because there is "typically" a substantial time lag between arrest and revocation and geographic disparity between the site of the arrest and the revocation, the Court mandated a preliminary hearing "at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available." *Id.* at 485. The constitutional requirement of this hearing, *id.* at 485-87, may be summarized as follows:

(1) The preliminary hearing must be before an independent, though not necessarily a judicial officer.

(2) There must be fair notice of the time, place, and purpose of the hearing.

(3) The accused must be able to speak on his own behalf.

(4) Upon request, he must be able to confront and question adverse witnesses, unless a security risk is shown.

(5) There should be a written summary of the hearing.

(6) Reasons for a finding of probable cause should be provided.

Morrissey provided similar but expanded rights at the subsequent parole revocation hearing: written notice of the alleged violations, disclosure of adverse

evidence, opportunity to speak and present evidence, opportunity to confront and cross-examine adverse witnesses (unless a security risk is shown), and a written summary by the factfinders, *Id.* at 489.

Less than a year later, the Court decided *Gagnon v. Scarpelli*, 411 U.S.778 (1973), the case that is the principal battle ground of the present dispute. Noting that *Mempa v. Rhay*, 389 U.S. 123 (1967) and *Morrissey v. Brewer*, 408 U.S. 471 (1972), "set the bounds for our present inquiry," *Scarpelli* at 781, the Court noted that respected commentators unanimously -- and presumably correctly -- "have agreed that revocation of probation where sentence has been imposed previously is constitutionally indistinguishable from the revocation of parole." *Id.* at 782 n. 3. Because the *Scarpelli* probationers had been sentenced at the time of trial, the Court viewed them as situated similarly to the *Morrissey* parolees rather than the *Mempa* probationer, who had not been sentenced until his probation was revoked.

Thus, the *Scarpelli* Court held the *Morrissey* procedural guarantees applicable to previously sentenced probationers. *Scarpelli* at 786. The Court declined to establish a *Mempa* per se right to counsel in such circumstances, however, believing that a case-by-case determination would adequately serve the ends of justice. *Scarpelli* at 790.

The Texas law

The Texas Legislature enacted its Suspended Sentence Law, Tex. Penal Code arts. 776-781, in 1913. *See* Morrisson, *Interpretive Commentary*, foll. Tex. Code Crim. Proc. Ann. art. 42.12. The modern statute was passed in 1965 to correct prior claims of abuse, "either real or supposed." Onion, *Special Commentary*, foll. Tex. Code Crim. Proc. Ann. art. 42.12.

The elaborate panoply of procedural and substantive

guarantees accorded probationers in Texas will be more fully explored below. Probation has not been the procedural stepchild in Texas that it has been in some other states. First, its use as a rehabilitative tool has "experienced astounding growth" in recent years. Arnold, *A Survey of Recent Law Concerning Revocation of Probation in Texas*, 52 S. Tex. L. J. 92 (1974). In 1979, for example, there were a total of 52,412 felony convictions in Texas; 33,252 of these resulted in probation. Texas Judicial Council, 51st Annual Report at 132 (1979). The statistics for the years 1975 through 1978 are substantially similar, with approximately 60% of all felony convictions ending in probation. (*See* Supplement B hereto). On September 1, 1976, there were more adult felony probationers in Texas -- 52,250 -- than in any other state except California, which on that date had 63,324 such probationers. *U.S. Department of Justice, State and Local Probation and Parole Systems*, Table 6 at 35 (Feb., 1978). By contrast, New York, for example, had only 25,228 probationers and Illinois, 11,343. (*id.*).

During the same time, the hallmarks of developing Texas probation law included revocation proceedings that were always judicially, never administratively, conducted. With few exceptions, all the rules of criminal procedure are applicable. There is an unqualified per se right to counsel at Texas revocation of probation proceedings, as well as unlimited right of appeal to the Texas Court of Criminal Appeals.

Given these developments, the holdings in dicta of the Texas Court of Criminal Appeals in *Ex parte Shivers*, 501 S.W.2d 898 (Tex.Crim.App. 1973), *Grant v. State*, 505 S.W.2d 259 (Tex.Crim.App. 1974), and *Whisenant v. State*, 557 S.W.2d 102 (Tex.Crim.App. 1977) -- so roundly criticized in the Brief for Appellant at 12-14 -- are much more understandable. In considering whether Texas probationers faced with possible revocation enjoy the right to counsel, the Court of Criminal Appeals has duly noted the Mempa-Scarpelli distinction based upon

suspension of imposition or suspension of execution of sentence. It is *Mempa*, not *Scarpelli*, that more closely resembles the Texas procedure.

It is also true that this Court has made it very clear that there is much room for flexibility in the promulgation of state codes of criminal procedure respecting revocation proceedings:

> We cannot write a code of procedure; that is the responsibility of each State. . .
>
> We have no thought to create an inflexible structure for parole revocation procedures.

Morrissey v. Brewer, 408 U.S. at 488, 490. Probationers for many years have occupied a favored status in Texas criminal law; it is this status that has caused the Texas Court of Criminal Appeals to reject as inadequate the protections afforded probationers by *Gagnon v. Scarpelli*. Where a probationer has pointed out a particular right -- such as the right to a preliminary hearing insisted upon by Vincent -- apparently afforded probationers under *Scarpelli*, but not afforded Texas probationers generally, the Court of Criminal Appeals has somewhat indignantly responded that the Texas probation revocation procedures in general greatly exceed the constitutional requirements. As a result, the Court of Criminal Appeals not unreasonably has believed that there is room for some play in the constitutional joints concerning specific details of its overall probation procedures.

2. Texas has responded appropriately in fashioning its own scheme of due process for probationers.

As this Court stated in *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972):

> Once it is determined that due process applies, the question remains what process is due. It has

> been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.

Examination of the procedural protections afforded probationers in Texas in comparison with those in other jurisdictions, *see* Supplement C, is indeed startling. First, a probationer in Texas ordinarily cannot be arrested until there has already been a judicial determination of probable cause. A probation officer is not a peace officer within the meaning of the Texas statutes. Tex. Code Crim. Proc. Ann. art. 2.12. For that reason, his power to arrest a probationer or anyone else is no greater than that of a private citizen. That power, as stated in Tex. Code Crim. Proc. Ann. art. 14.01, is the power to arrest without a warrant whenever an offender commits "in his presence or within his view" any offense "classed as a felony or as an offense against the public peace." Thus, Texas probationers are protected from arrest by their probation officers unless, in compliance with Tex. Code Crim. Proc. Ann. art. 42.12, sec. 8, such probation officer obtains "the order of the judge of such court" that the probationer should be arrested. *Cf.* 18 U.S.C. §3653, which allows federal probation officers to arrest probationers without a warrant.

Arrested Texas probationers may be admitted to bail in the discretion of the trial court. *Ex parte Ainsworth*, 532 S.W.2d 640 (Tex.Crim.App. 1976); *Valdez v. State*, 508 S.W.2d 842 (Tex.Crim.App. 1973). They enjoy both a general due process and a specific statutory right to a speedy revocation hearing. The former derives from the holdings of Texas courts that the speedy trial rights embodied in U.S. Const. amend. VI and Tex. Const. art. I, §10, are applicable to probation revocation proceedings. *Fariss v. Tipps*, 463 S.W.2d 176 (Tex. 1971). *See* Part II (A) below.

Further, Tex. Code Crim. Proc. Ann. art. 42.12, sec.

8(a) provides that a revocation hearing must be held within twenty days after one is requested. This provision is very strictly construed, *Ex parte Trillo*, 540 S.W.2d 728 (Tex.Crim.App. 1976), and is obviously designed to safeguard arrested probationers from undesirably lengthy pre-hearing incarceration.

The site of a revocation hearing is the state convicting court or the jurisdiction "where a violation of the conditions of probation occurs." Tex. Code Crim. Proc. Ann. art. 42.12, sec. 5.

As Vincent concedes, Texas provides far more than is constitutionally required at the hearing to revoke probation. (Brief for Appellant at 11-12). All the following additional features of the Texas scheme have been construed in favor of probationers:

(a) Texas probationers are entitled to detailed written notice of the claimed violations of probation. *Gordon v. State*, 575 S.W.2d 529 (Tex.Crim.App. 1978); *Graham v. State*,502 S.W.2d 809 (Tex.Crim.App. 1973); *Burkett v. State*, 485 S.W.2d 578 (Tex.Crim.App. 1972).

(b) There is a per se right to appointed counsel for indigent probationers. *Ex parte Sanders*, 588 S.W.2d 383 (Tex.Crim.App. 1979); *Ex parte Shivers*, 501 S.W.2d 898 (Tex.Crim.App. 1973).

(c) Unfavorable evidence must be disclosed. *Whisenant v. State*, 557 S.W.2d 102 (Tex.Crim.App. 1977).

(d) The opportunity to be heard in person and to present witnesses and documentary evidence must not be abridged. *Whisenant v. State; Masters v. State*, 545 S.W.2d 180 (Tex.Crim.App. 1977).

(e) Probationers have the right to confront and cross-examine adverse witnesses. *Whisenant v. State; Masters v. State.*

(f) A judicial and neutral setting is provided for the determination whether to revoke probation, at which the rights of speedy trial, *Carney v. State*, 573 S.W.2d 24 (Tex.Crim.App. 1978), the Fourth Amendment exclusionary rule, *Tamez v. State*, 534 S.W.2d 686 (Tex.Crim.App. 1976), protection from coerced confessions, *Dowdy v. State*, 534 S.W.2d 336 (1976), and virtually all other procedural rules associated with ordinary criminal trials are fully applicable. *Whisenant v. State; Masters v. State; Lovorn v. State*, 536 S.W.2d 356 (Tex.Crim.App. 1976).

(g) The probationer is entitled to a written statement by the factfinders as to the evidence relied on and reasons for revoking probation. *Whisenant v. State; Sappington v. State*, 508 S.W.2d 840 (Tex.Crim.App. 1974).

(h) There is a full right of appeal from the decision to revoke probation. Tex. Code Crim. Proc. Ann. art. 40.09.

From examination of the statutes and case law of other jurisdictions, it appears safe to say that few, if any, other states afford their probationers all these procedural and substantive protections. (*See* Supplement C). The Texas procedures far exceed those suggested by the ABA Standards Relating to Probation, §§5.1-5.4 (Feb. 1970 Draft). Only by myopically focusing in a manifestly unfair manner upon a very minor aspect of the Texas procedures -- the lack of a preliminary hearing -- may it be concluded that the Texas statutory scheme is deficient. Appellee avers that it is not.

3. In view of the fact that Vincent received a judicial determination of probable cause before he was arrested and was released on bond prior to his full and fair revocation hearing, he was not entitled to a preliminary hearing.

Consideration of all the facts of Vincent's case lead ineluctably to the conclusion that he has received ample due process protections. Wholly apart from his revocation hearing, which is unchallenged on any due process ground and could not be so challenged because of its full and fair nature, it should be recalled that he was arrested for driving while intoxicated by a police officer to whom he admitted that he was on probation and had been drinking. (R. 47, 83). The police officer formed the opinion that he was intoxicated, and called his probation officer. (R. 47, 49). He transported Vincent to jail where they were both met by Vincent's probation officer. (R. 49). That officer spoke with Vincent for a lengthy period of time, observed that he was intoxicated, and discussed the matter further with the arresting officer. (R. 13,14,31). He obtained a warrant for the arrest of Vincent. (A. 16-18). The order granting the arrest warrant issued by the trial judge states that the Court heard and considered the evidence offered in support and believed there was ample cause to arrest Vincent. (A. 18).

After being arrested, Vincent was hardly held incommunicado. He had a telephone conversation with his previous attorney and was visited by his probation officer. (R. 76-77, 92; Tr.22). He obtained a new attorney while in jail. (R. 76,92). Bail was available to him and he in fact was released on bond weeks before the revocation hearing. (Tr. 24; R. 23, 74, 80, 112).

In light of all these circumstances, the Court should not hold that Texas violated Vincent's constitutional rights by not affording him a preliminary hearing. Vincent admitted violating his probation at the time of his arrest. There was a judicial determination of probable cause to arrest him for that violation. He had free access to attorneys during the time he was in jail, and was released on bond prior to the eventual hearing, at which he received many more procedural protections than those minimally required by the Constitution.

To hold that in spite of all these factors, Texas was nevertheless bound to go through the meaningless formalistic ritual of a preliminary hearing would be contrary to this Court's frequent admonitions that the Constitution provides for flexibility in state procedures concerning the protection of criminals' rights. Moreover, in light of the purpose of the preliminary hearing, it would impermissibly elevate form over substance. The principal such purpose -- to prevent lengthy pretrial incarceration with no judicial determination of probable cause -- was achieved by other means in Vincent's case. A second such purpose, to preserve any relevant testimony of witnesses, was fulfilled by the full and fair revocation hearing that itself under Texas law required the presence and testimony of relevant witnesses.

Appellant Vincent has not been deprived of due process of law, but has in fact been treated more fairly than he might have been in virtually any other jurisdiction.

Indeed, it is worthwhile to note the numerous judicially created exceptions to the general requirement of a preliminary hearing in those jurisdictions -- many of which, unlike Texas, have no provision for any other judicial determination of probable cause prior to arrest. It has often been held, for example, that where the probationer is not taken into custody until the revocation hearing, there is no need for a preliminary hearing at all. *United States v. Sciuto*, 531 F.2d 842, 846 (7th Cir. 1976); *Fay v. Commonwealth*, 399 N.E.2d 11 (Mass.S.Jud.Ct. 1980); *Curtis v. State*, 370 N.E.2d 385, 387-88 (Ind.Ct.App. 1977); *State v. Fry*, 550 P.2d 697 (Wash.Ct.App. 1976); *Pearson v. State*, 241 N.W.2d 490, 493 (Minn. 1976); *Petition of Meidinger*, 539 P.2d 1185 (Mont. 1975).

There is no need for preliminary hearing where the probationer is validly incarcerated on other grounds. *United States v. Sutton*, 607 F.2d 220 (8th Cir. 1979);

United States v. Tucker, 524 F.2d 77 (5th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976). There is no need for a preliminary hearing where the probationer or parolee has already been indicted by a grand jury for a different offense, *Inmates' Councilmatic Voice v. Rogers*, 541 F.2d 633, 635 (6th Cir. 1976), or where the parolee or probationer has already been convicted of another offense, *Jones v. Johnston*, 534 F.2d 353, 357 (D.C. Cir. 1976).

Other courts have held that there is no need for a preliminary hearing where the probable cause is evident, as, for example, where the probationer is arrested out of state in apparent violation of a plain condition of his probation. *Chilembwe v. Wyrick*, 574 F.2d 985, 987 (8th Cir. 1978); *Stidham v. Wyrick*, 567 F.2d 836, 837-38 (8th Cir. 1977).

There is no need for a preliminary hearing where the parolee or probationer admits that he is in violation of his parole or probation. *State v. Lohnes*, 266 N.W.2d 109 (S.D. 1978); *People v. Rial*, 249 N.W.2d 114 (Mich. 1976); *Gardner v. Collier*, 274 So.2d 662 (Miss. 1973).

Clearly a preliminary hearing is not an indispensible element of the due process that must be afforded probationers. In some circumstances it may be a valid means of implementing due process interests. But in others, it is not an invariable or even the best means of implementing such interests. In light of the entire Texas statutory scheme and the facts of the instant case, the failure to give Vincent a preliminary hearing did not deny him due process of law.

B. If the Texas Probation Revocation Statute is Unconstitutional, It can only be Unconstitutional to the Extent that it does not Provide for Notice to be given to Arrested Probationers of their Right to a Prompt Hearing.

Alternatively, Texas asks that Tex. Code Crim. Proc.

Ann. art. 42.12 not be held unconstitutional for failure to afford Vincent a preliminary hearing. There is a much less onerous alternative, in light of the Texas statute, that would appear uncontestably to fulfill all the goals of a preliminary hearing set forth in *Gerstein v. Pugh*, 420 U.S. 103 (1975) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Vincent correctly notes the statutory requirement that a full revocation hearing be held within twenty days after one is requested by the arrested probationer. His principal complaint is that he was allegedly unaware of this protection. Surely he would not be before the Court if he had known he possessed the means to end his prehearing incarceration after only twenty days. The most, therefore, that this Court should do is to hold the Texas statute unconstitutional only to the extent of its failure to inform arrested probationers of their statutory right to a revocation hearing within twenty days after one is requested. Such relief would be much less burdensome to Texas, and yet afford arrested probationers all important rights to which they are entitled.

II.

ANY ERROR IN NOT ACCORDING VINCENT OR ANY OTHER TEXAS PROBATIONER A PRELIMINARY HEARING IS, IN LIGHT OF THE TEXAS REQUIREMENTS OF A PRE-ARREST DETERMINATION OF PROBABLE CAUSE AND A FULL AND FAIR REVOCATION HEARING, HARMLESS BEYOND A REASONABLE DOUBT.

A. The Texas Courts' Refusal to Accord Vincent a Preliminary Hearing has no Bearing on his Present Incarceration.

Vincent, as discussed in detail in Part I(A) above, was accorded a full panoply of due process rights at his

probation revocation hearing. His present constitutional challenge is limited to the assertion that he did not receive a preliminary hearing. He complains of no inadequacy or deficiency whatsoever in the revocation proceedings. Further, he admitted the basis of his revocation at the hearing -- that he was driving while intoxicated. He challenges only an allegedly improper temporary detention prior to the revocation hearing. And he raises this challenge even though he was arrested for violating his probationary conditions only after issuance of a judicial warrant executed after a showing of probable cause. (A. 18).

Vincent offers the Court two choices in the event it is concluded he was wrongfully denied a preliminary hearing. First, he suggests that the Court "remand the case for a determination of probable cause" that he has violated the conditions of his probation. (Brief of Appellant at 17). Vincent has, however, already received this determination -- not once, but twice. First, the state trial court "heard and considered the evidence" and determined that a warrant for Vincent's arrest should issue. (A. 18). Second, at the hearing on the merits, the trial judge determined that the State had fulfilled its burden to show by a preponderance of the evidence that Vincent had violated his probationary conditions. If the State adduced "that greater weight of the credible evidence which would create a reasonable belief that the defendant has violated a condition of his probation," the necessary Texas standard under *Scamardo v. State*, 517 S.W.2d 293, 298 (Tex.Crim.App. 1974), that the State has demonstrated probable cause to arrest is *a fortiori*. Vincent also asks that the Court reverse the judgment and "direct the dismissal of the Texas proceedings" in their entirety. (Brief of Appellant at 17). That avenue of relief, however, should be foreclosed because Vincent's present incarceration is not a result of the wrong he purportedly suffered: deprivation of a preliminary hearing.

This conclusion is apparent from examination of *Gerstein v. Pugh*, 420 U.S. 103 (1975), where the Court determined that unindicted defendants in Florida who were arrested without warrants were denied their rights to a preliminary hearing in violation of the Fourth Amendment to the United States Constitution. Even so: "[A] conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause." *Gerstein v. Pugh*, 420 U.S. at 119. The basis for this decision is the well-established rule that an illegal arrest or detention will not void a subsequent conviction. *United States v. Crews*, ___ U.S. ___ , 100 S.Ct. 1244 (1980); *Rose v. Mitchell*, 443 U.S. 545, 576 (1979)(concurring opinion of Stewart, J.); *Gerstein v. Pugh; Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886).

The *Gerstein v. Pugh* rule, as distilled from the so-called Ker-Frisbie doctrine, seems plainly applicable to Vincent, a probationer detained upon a warrant, but without a formal preliminary hearing. In fact, all courts that have considered the matter, including *Collins v. Turner*, 599 F.2d 657, 658 (5th Cir. 1979); and *United States v. Companion*, 545 F.2d 308, 313 (2d Cir. 1976), are apparently in unanimous agreement upon the point. *See also, United States v. Millican*, 600 F.2d 273, 275 (5th Cir. 1979), *cert. denied*, ___ U.S. ___ , 100 S.Ct. 1274 (1980); *United States v. Postal*, 589 F.2d 862, 873 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *Pruitt v. Hutto*, 542 F.2d 458, 459 (8th Cir. 1976); *United States v. Marzano*, 537 F.2d 257, 271 (7th Cir.), *cert. denied*, 429 U.S. 1038 (1976); *United States v. Miller*, 532 F.2d 1335, 1339 (10th Cir.), *cert. denied*, 429 U.S. 839 (1976); *Britt v. McKenney*, 529 F.2d 44, 46 (1st Cir.), *cert. denied*, 429 U.S. 854 (1976); *United States v. Lira*, 515 F.2d 68, 72 (2d Cir.)(concurring opinion of Oakes, C.J.), *cert. denied*, 423 U.S. 847 (1975). *Cf. United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974).

The purpose of the *Gerstein v. Pugh* preliminary

hearing -- to determine probable cause -- is not precisely identical with that of the *Morrissey-Scarpelli* preliminary hearing, which serves the purpose of gathering and preserving testimony where the final revocation hearing may be held at a distant place from the violation. *Gerstein v. Pugh*, 420 U.S. at 867 n. 22. Nevertheless, the general nature of the claim that a defendant or probationer was denied a preliminary hearing, which is essentially one of illegal detention pending trial or final probation revocation, is the same. The established rule applied in *Gerstein v. Pugh* that an illegal detention will not void a subsequent conviction should be applied in the present case. Such a rule would not save Texas from an otherwise correct adjudication that its probation statute is at least in part unconstitutional, but would save Texas from the more onerous and unfair effects of such an adjudication.

It has been suggested that this analysis, focusing upon the inappropriateness of release from custody as a remedy for violation of a right bearing no relation to present incarceration, has "the unfortunate ring to it of affording a right without a remedy." *United States v. Companion*, 545 F.2d 308, 313 (2d Cir. 1976), *citing United States ex rel. Hahn v. Revis*, 520 F.2d 632, 639 (7th Cir. 1975). There are several satisfactory responses, however, as found by the Second Circuit Court of Appeals in *United States v. Companion*. This is particularly true in Texas.

First, for extreme violations, a claim for monetary damages under 42 U.S.C. §1983 or perhaps Tex. Rev. Civ. Stat. Ann. art. 6252-26, *see Estelle v. Gamble*, 429 U.S. 97, 107 & n.15 (1976), would seem appropriate. *Baker v. McCollan*, 433 U.S. 137 (1979); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). It is true that in light of the present pronouncements of the Texas Court of Criminal Appeals, especially *Whisenant v. State*, 557 S.W.2d 102 (Tex.Crim.App. 1977), a good faith defense based upon reliance on existing law would probably bar any such

cause of action. *See Procunier v. Navarette*, 434 U.S. 555 (1978); *Imbler v. Pachtman*, 424 U.S. 409 (1976). But a pronouncement that preliminary hearings are constitutionally required under Texas procedures would render a damages claim available in the future.

In addition, there are several aspects of Texas law that greatly ameliorate an arrested probationer's circumstances. (*See* Part I(A) above). In particular, the Texas courts have held that the general speedy trial rights established in the Sixth Amendment to the United States Constitution and Tex. Const. art. I, §10, are fully applicable to probation revocation proceedings in Texas. *Fariss v. Tipps*, 463 S.W.2d 176 (Tex. 1971). Hence, Texas probationers are protected by the provisions of *Barker v. Wingo*, 407 U.S. 514 (1972), as held in *Carney v. State*, 573 S.W.2d 24 (Tex.Crim.App. 1978).

Also, Texas provides a strict *statutory* right to a revocation hearing within twenty days after arrest, provided only that there be a request for such a speedy hearing. Tex. Code Crim. Proc. Ann. art. 42.12, sec. 8(a). The drastic remedy for violation of this statute is dismissal of the revocation motion. *Ex parte Trillo*, 540 S.W.2d 728 (Tex.Crim.App. 1976). An arrested probationer may seek his release from a pretrial incarceration on this basis by appropriate motion for hearing, motion for release on bond, or application for writ of habeas corpus. *Id. See* Note 5, Am. J. Crim. L. 354, 369-70 & n.64 (1977).

Finally, if an illegally arrested probationer is not released, Texas fully applies the exclusionary rule at probation revocation hearings to bar any evidence, testimonial or tangible, obtained as a result of an illegal arrest or detention. *Davis v. State*, 576 S.W.2d 378 (Tex.Crim.App. 1978); *Tamez v. State*, 534 S.W.2d 686 (Tex.Crim.App. 1976). Hence, although an illegal arrest or detention may not bar a subsequent revocation, Texas

does prohibit the use of the fruit of any such arrest or detention.

In summary, Vincent and other Texas probationers are sufficiently protected against the violation of a right to a preliminary hearing. Because Texas's final revocation procedures are indisputably valid, the *Gerstein v. Pugh* rule should be applied to prevent the entire probation revocation from being invalidated by a temporary, possibly illegal detention.

B. Any Holding Adverse to Texas should be Applied Prospectively Only.

In the substantive area of procedural protections for parolees, probationers, and prisoners, the Court when establishing a new rule has often followed the practice of announcing that the rule is to be applied prospectively only. *E.g., Wolff v. McDonnell*, 418 U.S. 539, 573 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 490 (1972). If a holding adverse to Texas is contemplated here, Texas requests that that practice again be followed.

The Court's leading pronouncement upon the retroactivity of rulings embodying procedural guarantees is *Linkletter v. Walker*, 381 U.S. 618 (1965). As summarized in *Stovall v. Denno*, 388 U.S. 293, 297 (1967), the analysis established in *Linkletter* emphasizes the purpose to be served by the new standard, the extent of reliance by law enforcement authorities on the old standard, and the effect on the administration of justice of retroactive application of the new standard. *Desist v. United States*, 394 U.S. 244, 249 (1969).

The Court has applied those criteria to Morrissey-Scarpelli procedural rules in the past and found no sound basis for applying them retroactively. The overriding consideration has been the "significant impact a retroactivity ruling would have on the administration of all prisons in the country, and the reliance prison officials placed, in good faith, on prior

law not requiring such procedures." *Wolff v. McDonnell*, 418 U.S. at 574. *See Morrissey v. Brewer*, 408 U.S. at 490. The Court has also examined whether procedural deficiencies and erroneous factual conclusions under the old procedures were "so pervasive" as to warrant the cost of a retroactive holding. *id.* In the instant case, these concerns militate strongly in favor on the non-retroactivity of any constitutionally based holding the Court might reasonably contemplate.

First, the impact of a retroactivity ruling upon the criminal justice systems and procedures in many states would be enormous. Numerous states, including many of the most populous, have refused to require preliminary hearings generally. (*See* Supplement C.) A ruling by this Court that a preliminary hearing is mandated in all circumstances and that the failure to provide one voids any subsequent probation revocation would have a widespread adverse effect on the administration of justice in Texas and elsewhere.

Probation is a commonly used tool in Texas to encourage effective rehabilitation of convicted criminals. In fact, during the past five years almost *sixty per cent* (60%) of all felony convictions in Texas have resulted in the imposition of probation. (*See* Supplement B). During the same period of time, there have been 20,926 revocations revoked (*id.*) following a full and fair final hearing. This statistic represents less than twenty per cent (20%) of all the probations granted in Texas -- *i.e.*, more than eighty per cent (80%) of all Texas probations appear to be successfully served (*id.*). Obviously, a significant although not precisely known number of inmates are presently incarcerated in the Texas Department of Corrections as a result of having had their probations revoked.

Second, the Texas courts have legitimately distinguished the Texas imposition of sentence probation revocation process from the Wisconsin execution of sentence revocation process that was

considered in *Scarpelli*. *See Ex parte Shivers*, 501 S.W.2d 898 (Tex.Crim.App. 1973). The Texas courts have determined that *Mempa v. Rhay*, 389 U.S. 128 (1967) furnishes the more appropriate guidelines for Texas procedures. Most significantly, the Texas courts have consistently adhered to the view that because of these guidelines, Texas is bound to *exceed* the minimal *Scarpelli* requirements. The Texas Court of Criminal Appeals, as discussed in detail in Part I (A) above, has consistently held, "The proceeding to revoke probation, although not the same as a criminal trial, requires substantially all the same procedures." *Whisenant v. State*, 557 S.W.2d 102, 104 (Tex.Crim.App. 1977).

Thus, the Texas courts have established revocation procedures for probationers "far greater than those required by *Morrissey v. Brewer*, *supra* and *Gagnon v. Scarpelli*, *supra*," *Whisenant*, 557 S.W.2d at 105, including, of course, a pro se right to counsel. In light of this approach, which also includes the substantial pre-revocation hearing protections discussed above, Texas should not be penalized for not requiring formal preliminary hearings in all cases.

Finally, the risk of procedural error is not so pervasive in the Texas probation revoction system as to warrant the cost or result of a retroactive requirement that preliminary hearings be held in all probation revocations. As argued above, every probationer is given a final revocation hearing at which he is accorded full due process rights. For that reason, the risk of an erroneous factual determination at a Texas probation revocation hearing is less than the risk in other states that accord preliminary hearings, but give very limited due process rights at the hearing on the merits of the revocation motion.

In fact, it is obvious that the only persons harmed as a result of the Texas procedures are those probationers who were erroneously incarcerated without probable cause before their revocation hearings. But these

persons have already received their remedy, either by being released sometime before their hearing or by having had their probation continued, not revoked, at such a hearing.[2]

Hence, the drastic remedy of a retroactive application of the rule advocated by Vincent would be unlikely to help those persons who have been wronged by its violation. No Texas revocation of probation following a full hearing should be voided by failure to have accorded the probationer a preliminary hearing because there is little, if any, reason to believe that he was ever wrongfully detained.

III.

VINCENT'S APPEAL SHOULD BE DISMISSED BECAUSE HE FAILED TO COMPLY WITH FORMER SUP.CT. R. 11(1), 28 U.S.C. (1970).

A. Vincent Has Not Timely Filed a Notice of Appeal to the Supreme Court of the United States with the Texas Court of Criminal Appeals, the "Court Possessed of the Record."

Former Sup. Ct. R. (11), 28 U.S.C. (1970) -- which was in effect when Vincent sought to file notice of appeal -- provides as follows:

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[2]*See* Supplement B, which demonstrates that fewer than half the motions to revoke probation filed by prosecutors in Texas are ultimately granted by the Texas courts. Even if a Texas judge finds at a revocation hearing that a probationer has violated the conditions of his probation, the judge may in his discretion nevertheless continue the probation or, in certain circumstances, reduce the originally assessed term of imprisonment if such a reduction is in "the best interests of society and the probationer." Tex. Code. Crim. Proc. Ann. art. 42.12, sec. 8(a).

> An appeal to review the judgment of a state court of last resort in a criminal case shall be deemed in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the court possessed of the record within ninety days after the entry of such judgment and the case is docketed within the time provided in Rule 13.

Vincent freely admits that he has failed to file notice of appeal to this Court with the Texas Court of Criminal Appeals, the deciding state court of last resort. (Brief for Appellant at 2, 15). Because of his failure to comply with this Court's rules, Vincent's appeal should be dismissed.

Vincent claims for the first time in his brief on the merits that he attempted to send notice of appeal to the Texas Court of Criminal Appeals, but that "for some unknown reason" (Brief for Appellant at 16) filing was never accomplished. He further claims and Texas concedes that he did accomplish filing with the state convicting court.

First, Vincent's recently raised claim that he attempted to file notice of appeal with the Texas Court of Criminal Appeals is without merit because it rests upon facts wholly outside and indeed refuted by the existing record. The record on appeal simply contains no notice of appeal whatsoever. And Vincent has produced no documentary proof that he ever attempted to file notice in the Court of Criminal Appeals.

Second, filing notice of appeal in the state trial court is insufficient to comply with former Rule 11(1). Although the trial court compiles the appellate record with material pleadings, court documents, a statement of facts, and briefs of both the defendant and the State, the trial court does not possess the full record. Its record does not contain copies of all the appellate proceedings. For example, motions for rehearing, supplemental briefs, and pro se briefs -- unlike the opening briefs of

the parties -- are filed only with the Texas Court of Criminal Appeals. Tex. Code Crim. Proc. Ann. art. 40.09, secs. 9, 10; Rules 11, 12, Texas Court of Criminal Appeals, *foll.* Tex. Code Crim. Proc. Ann. art. 44.33. Also, it is no small matter that the opinions of the appeals court are, of course, not contained in the records of the trial court.

Further, not all documents filed in the trial court are included in the record on appeal. Under Tex. Code Crim. Proc. Ann. art. 40.09, sec. 2, the parties file written designations of those items relevant to the merits of the appeal, as was done in this case. (A. 35). Only those items are forwarded to the Texas Court of Criminal Appeals and, for that matter, to this Court if it requests the record on appeal.

Vincent notes that under Tex. Code Crim. Proc. Ann. art. 40.09, sec. 1, the clerk of the trial court is required to prepare a duplicate copy of the appellate record. He argues, in an ingenious but sophistical attempt to circumvent the plain import of this Court's rules, "Under a strict reading of the state statute, the original record remains with the clerk of the trial court and the copy becomes the appellate record insofar as the state appeals process is concerned." (Brief of Appellant at 16-17). He intimates that because the original copy is filed with the trial court, he properly filed his notice of appeal there. This argument is both erroneous and irrelevant.

The relevant portion of art. 40.09, sec. 1, recites as follows:

> The record shall be made in duplicate and one copy shall be retained by the clerk for use by the parties with permission of the court.

It is unclear from this statute whether the trial court should retain the original record and transmit a copy to the Court of Criminal Appeals, or follow the converse procedure. At least one Texas case, *Paulos v. State*, 248

S.W.2d 928, 930 (Tex.Crim.App. 1952), suggests that the original record should generally be forwarded to the Court of Criminal Appeals. In truth, Tex. Code Crim. Proc. Ann. art. 40.09, sec. 15, provides that *either* original *or* duplicate copies of "papers or exhibits" should be included in the record on appeal depending upon the trial and appeal court's judgment as to the course of action most appropriate under the circumstances. In fact, Vincent's record appears to include some original and some duplicate items.

In any event, the location of the original trial record is irrelevant. What is crucial is the location of the *appellate* record, whether comprised mainly of original or duplicate documents. A Texas statute is unequivocal upon that point:

> Upon refusal of the [trial] court to grant defendant a new trial, *the clerk shall thereupon promptly transmit the record and briefs to the Court of Criminal Appeals*, in which court all grounds of error and arguments in support thereof urged in defendant's brief in the trial court shall be reviewed, as well as any unassigned error which in the judgment of the Court of Criminal Appeals should be reviewed in the interest of justice. (emphasis added).

Tex. Code Crim. Proc. Ann. art. 40.09, sec. 13. The statute plainly contemplates transmission of the record to the Court of Criminal Appeals. Because Vincent has never filed notice of appeal there, he has failed to file notice of appeal in the proper Court in a timely fashion. *See Richardson v. Blumenthal*, 435 U.S. 939 (1978); *Gabriel v. United States*, 429 U.S. 887 (1976); *Charger Investments, Inc. v. Corbett*, 429 U.S. 877 (1976); *Taggart v. New York*, 392 U.S. 667 (1967). *See also* R. Stern & E. Gressman, Supreme Court Practice 509, 516 (5th ed. 1978). The appeal should be dismissed.

B. Both the Policies underlying Former Sup. Ct. R. 11(1), 28 U.S.C. (1970), and the Language of Present Sup. Ct. R. 11(1), 28 U.S.C. (1980), Evidence an Intent that Notice of Appeals be Filed with the Deciding State Court of Last Resort.

This Court's intent in former Rule 11(1) may be determined by comparing the relative benefits of giving notice of appeal to the trial court and to the appeals court. A trial court ordinarily does not act as a pioneer of new areas of the law, but is instead bound by determinations of law set forth by appellate courts. The trial court's primary function is to develop facts properly and to apply those facts to existing law. An appeals court, however, particularly a court of last resort in a criminal case, often does pioneer new areas of law. Because of this aspect of its proper function, such a court can and does reverse decisions previously made by the trial court.

Vincent gave notice of appeal to the trial court, although such notice was futile once the conviction was final since the trial court could do nothing to reverse the prior decision. But Vincent might have given proper notice to the Texas Court of Criminal Appeals at a time when that court retained a measure of jurisdiction over the cause.

The present Sup. Ct. R. 11(1), 28 U.S.C. (1980), supports these interpretions. The Rule now recites that notice of appeal should be filed with "the court from whose judgment the appeal is taken." The clarification of Rule 11(1) evidences the result this Court intended to achieve with the old Rule 11(1).

CONCLUSION

For these reasons, Appellee the State of Texas respectfully prays that this appeal be dismissed or, in the alternative, that the judgment of the Texas Court of Criminal Appeals be affirmed.

Respectfully submitted,

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Marlow v. State, 43 Ala. App. 494, 192 So.2d 926 (Ala.Ct.App. 1966)
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ALASKA
ALASKA STAT.§§12.55.085, 12.55.090, 12.55.110 (1979 & Supp. 1979)

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* Where information is unknown, a blank appears in the Chart. Information may be unknown because the statutes and case law of the jurisdiction are too vague to provide a certain answer; because the statutes and case law appear to conflict; or because for some other reason the matter appears unanswerable without reference to local practice.

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SUPPLEMENT A

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(Vernon 1979 & Supp. 1979)

Art. 42.12.

Adult Probation, Parole, and Mandatory Supervision Law

A. Purpose of Article and Definitions

Section 1. It is the purpose of this Article to place wholly within the State courts of appropriate jurisdiction the responsibility for determining when the imposition of sentence in certain cases shall be suspended, the conditions of probation, and the supervision of probationers, in consonance with the powers assigned to the judicial branch of this government by the Constitution of Texas. It is also the intent of this Article to provide for the release of persons on parole and for the method thereof, to designate the Board of Pardons and Paroles as the responsible agency of State government to recommend determination of paroles and to further designate the Board of Pardons and Paroles as responsible for the investigation and supervision of persons released on parole. It is the intent of this Article to aid all prisoners to readjust to society upon completion of their period of incarceration by providing a program of mandatory supervision for those prisoners not relased on parole or through executive clemency and to designate the Board of Pardons and Paroles as the agency of government responsible for the program. It is the final purpose of this Article to remove from existing statutes the limitations, other than questions of constitutionality, that have acted as barriers to effective systems of probations and paroles in the public interest.

Sec. 2. This Article may be cited as the "Adult Probation, Parole, and Mandatory Supervision Law".

Unless the context otherwise requires, the following definitions shall apply to the specified words and phrases as used in this Article:

a. "Courts" shall mean the courts of record having

original criminal jurisdiction;

b. "Probation" shall mean the release of a convicted defendant by a court under conditions imposed by the court for a specified period during which the imposition of sentence is suspended;

c. "Parole" shall mean the release of a prisoner from imprisonment but not from the legal custody of the State, for rehabilitation outside of prison walls under such conditions and provisions for disciplinary supervision as the Board of Pardons and Paroles may determine. Parole shall not be construed to mean a commutation of sentence or any other form of executive clemency;

d. "Mandatory supervision" shall mean the release of a prisoner from imprisonment but not on parole and not from the legal custody of the State, for rehabilitation outside of prison walls under such conditions and provisions for disciplinary supervision as the Board of Pardons and Paroles may determine. Mandatory supervision may not be construed as a commutation of sentence or any other form of executive clemency;

e. "Probation officer" shall mean either a person duly appointed by one or more courts of record having original criminal jurisdiction, to supervise defendants placed on probation; or a person designated by such courts for such duties on a part-time basis;

f. "Parole officer" shall mean a person duly appointed by the Director of the Division of Parole Supervision and assigned the duties of investigating and supervising paroled prisoners and prisoners released to mandatory supervision to see that the conditions of parole or mandatory supervision are complied with;

g. "Board" shall mean the Board of Pardons and Paroles;

h. "Division" shall mean the Division of Parole Supervision of the Board of Pardons and Paroles; and

i. "Director" shall mean the Director of the Division of Parole Supervision.

B. Probations

Sec. 3. The judges of the courts of the State of Texas having original jurisdiction of criminal actions, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public as well as the defendant will be subserved thereby, shall have the power, after conviction or a plea of guilty for any crime or offense, where the maximum punishment assessed against the defendant does not exceed ten years imprisonment, to suspend the imposition of the sentence and may place the defendant on probation or impose a fine applicable to the offense committed and also place the defendant on probation as hereinafter provided. In all cases where the punishment is assessed by the Court it may fix the period of probation without regard to the term of punishment assessed, but in no event may the period of probation be greater than 10 years or less than the minimum prescribed for the offense for which the defendant was convicted. Any such person placed on probation, whether in a trial by jury or before the court, shall be under the supervision of such court.

Sec. 3a. Where there is a conviction in any court of this State and the punishment assessed by the jury shall not exceed ten years, the jury may recommend probation for a period of any term of years authorized for the offense for which the defendant was convicted, but in no event for more than ten years, upon written sworn motion made therefor by the defendant, filed before the trial begins. When the jury recommends probation, it may also assess a find applicable to the offense for which the defendant was convicted. When the trial is to a jury, and the defendant has no counsel, the court shall inform the defendant of his right to make

such motion, and the court shall appoint counsel to prepare and present same, if desired by the defendant. In no case shall probation be recommended by the jury except when the sworn motion and proof shall show, and the jury shall find in their verdict that the defendant has never before been convicted of a felony in this or any other State. This law is not to be construed as preventing the jury from passing on the guilt of the defendant, but he may enter a plea of not guilty. In all eligible cases, probation shall be granted by the court, if the jury recommends it in their verdict, for the period recommended by the jury.

If probation is granted by the jury the court may impose only those conditions which are set forth in Section 6 hereof.

Sec. 3b. Where probation is recommended by the verdict of a jury as provided for in Sec. 3a above, a defendant's probation shall not be revoked during his good behavior, so long as he is within the jurisdiction of the court and his residence is known, except in accordance with the provisions of Sec. 8 of this Article. If such a defendant has no counsel, it shall be the duty of the court to inform him of his right to show any cause why his probation should not be revoked; and if such a defendant requests such right, the court shall appoint counsel in accordance with Articles 26.04 and 26.05 of this Code to prepare and present the same; and in all other respects the procedure set forth in said Sec. 8 of this Article shall be followed.

Sec. 3c. Nothing herein shall limit the power of the court to grant a probation of sentence regardless of the recommendation of the jury or prior conviction of the defendant.

Sec. 3d. (a) When in its opinion the best interest of society and the defendant will be served, the court may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it

substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on probation on reasonable terms and conditions as the court may require and for a period as the court may precribe not to exceed 10 years. However, upon written motion of the defendant requesting final adjudication filed within 30 days after entering such plea and the deferment of adjudication, the court shall proceed to final adjudication as in all other cases.

(b) On violation of a condition of probation imposed under Subsection (a) of this section, the defendant may be arrested and detained as provided in Section 8 of this Article. The defendant is entitled to a hearing limited to the determination by the court of whether it proceeds with an adjudication of guilt on the original charge. No appeal may be taken from this determination. After an adjudication of guilt, all proceedings, including assessment of punishment, pronouncement of sentence, granting of probation, and defendant's appeal continue as if the adjudication of guilt had not been deferred.

(c) On expiration of a probationary period imposed under Subsection (a) of this section, if the court has not proceeded to adjudication of guilt, the court shall dismiss the proceedings against the defendant and discharge him. The court may dismiss the proceedings and discharge the defendant prior to the expiration of the term of probation if in its opinion the best interest of society and the defendant will be served. A dismissal and discharge under this section may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense, except that upon conviction of a subsequent offense, the fact that the defendant had previously received probation shall be admissible before the court or jury to be considered on the issue of penalty.

Sec. 3e. (a) For the purposes of this section, the jurisdiction of the courts in this state in which a sentence

requiring confinement in the Texas Department of Corrections is imposed for conviction of a felony shall continue for 120 days from the date the execution of the sentence actually begins. After the expiration of 60 days but prior to the expiration of 120 days from the date the execution of the sentence actually begins, the judge of the court that imposed such sentence may, on his own motion or on written motion of the defendant, suspend further execution of the sentence imposed and place the defendant on probation under the terms and conditions of this article, if such sentence is otherwise eligible for probation under this article and prior to the execution of such sentence, the defendant had never been incarcerated in a penitentiary serving a sentence for a felony and in the opinion of the judge the defendant would not benefit from further incarceration in a penitentiary. Probation may be granted under this section only if the offense for which the defendant was sentenced was an offense other than criminal homicide, rape, or robbery.

(b) When the defendant files a written motion requesting suspension by the court of further execution of the sentence and placement on probation, or when requested to do so by the judge, the clerk of the court shall request a copy of the defendant's record while incarcerated from the Texas Department of Corrections. Upon receipt of such request, the Texas Department of Corrections shall forward to the court, as soon as possible, a full and complete copy of the defendant's record while incarcerated.

Sec. 3f. (a) The provisions of Sections 3 and 3c of this Article do not apply:

(1) to a defendant adjudged guilty of an offense defined by the following sections of the Penal Code:

(A) Section 19.03 (Capital murder);

(B) Section 20.04 (Aggravated kidnapping);

(C) Section 21.03 (Aggravated rape);

(D) Section 21.05 (Aggravated sexual abuse);

(E) Section 29.03 (Aggravated robbery); or

(2) to a defendant when it is shown that the defendant used or exhibited a deadly weapon as defined in Section 1.07(a)(11), Penal Code, during the commission of a felony offense or during immediate flight therefrom. Upon affirmative finding that the defendant used or exhibited a deadly weapon during the commission of an offense or during immediate flight therefrom, the trial court shall enter the finding in the judgment of the court. Upon a affirmative finding that the deadly weapon the defendant used or exhibited was a firearm, the court shall enter that finding in its judgment.

(b) If there is an affirmative finding that the defendant convicted of a felony of the second degree or higher used or exhibited a firearm during the commission or flight from commission of the offense and the defendant is granted probation, the court may order the defendant confined in the Texas Department of Corrections for not less than 60 and not more than 120 days. At any time after the defendant has served 60 days in the custody of the Department of Corrections, the sentencing judge, on his own motion or on motion of the defendant, may order the defendant released to probation. The Department of Corrections shall release the defendant to probation after he has served 120 days.

Sec. 4. When directed by the court, a probation officer shall fully investigate and report to the court in writing the circumstances of the offense, criminal record, social history and present condition of the defendant. Whenever practicable, such investigation shall include a physical and mental examination of the defendant. Defendant, if not represented by counsel, counsel for defendant and counsel for the state shall be

afforded an opportunity to see a copy of the report upon request. If a defendant is committed to any institution the probation officer shall send a report of such investigation to the institution at the time of commitment.

Sec. 5. Only the court in which the defendant was tried may grant probation, fix or alter conditions, revoke the probation, or discharge the defendant, unless the court has transferred jurisdiction of the case to another court with the latter's consent. After a defendant has been placed on probation, jurisdiction of the case may be transferred to a court of the same rank in this State having geographical jurisdiction where the defendant is residing or where a violation of the conditions of probation occurs. Upon transfer, the clerk of the court of original jurisdiction shall forward a transcript of such portions of the record as the transferring judge shall direct to the court accepting jurisdiction, which latter court shall thereafter proceed as if the trial and conviction had occurred in that court. Any court having geographical jurisdiction where the defendant is residing or where a violation of the conditions of probation occurs may issue a warrant for his arrest, but the determination of action to be taken after arrest shall be only by the court having jurisdiction of the case at the time the action is taken.

Sec. 6. The court having jurisdiction of the case shall determine the terms and conditions of probation and may, at any time, during the period of probation alter or modify the conditions; provided, however, that the clerk of the court shall furnish a copy of such terms and conditions to the probationer, and shall note the date of delivery of such copy on the docket. Terms and conditions of probation may include, but shall not be limited to, the conditions that the probationer shall:

a. Commit no offense against the laws of this State or of any other State or of the United States;

b. Avoid injurious or vicious habits;

c. Avoid persons or places of disreputable or harmful character;

d. Report to the probation officer as directed;

e. Permit the probation officer to visit him at his home or elsewhere;

f. Work faithfully at suitable employment as far as possible;

g. Remain within a specified place;

h. Pay his fine, if one be assessed, and all court costs whether a fine be assessed or not, in one or several sums, and make restitution or reparation in any sum that the court shall determine;

i. Support his dependents;

j. Participate in any community-based program;

j. Reimburse the county in which the prosecution was instituted for compensation paid to appointed counsel for defending him in the case, if counsel was appointed.

k. Remain under cutodial supervision in a community-based facility, obey all rules and regulations of such facility, and pay a percentage of his income to the facility for room and board;

l. Pay a percentage of his income to his dependents for their support while under custodial suspension in a community-based facility; and

m. Pay a percentage of his income to the victim of the offense, if any, to compensate the victim for any property damage or medical expenses sustained by the victim as a direct result of the commission of the offense.

Sec. 6a. (a) A court granting probation may fix a

fee not exceeding $15 per month to be paid to the court by the probationer during the probationary period. The court may make payment of the fee a condition of granting or continuing the probation.

(b) The court shall distribute the fees received under Subsection (a) of this section to the county or counties in which the court has jurisdiction for use in administering the probation laws. In instances where a district court has jurisdiction in two or more counties, the court shall distribute the fees received to the counties in proportion to population as prescribed by Paragraph 7, Section 10 of this Article.

Sec. 6b. (a) When the court having jurisdiction of the case grants probation to the defendant, in addition to the conditions imposed under Section 6 of this article, the court may require as a condition of probation that the defendant submit to a period of detention in a penal institution to serve a term of imprisonment not to exceed 30 days or one-third of the sentence whichever is lesser.

(b) The imprisonment imposed shall be treated as a condition of probation, and in the event of a sentence of imprisonment upon the revocation of probation, the term of imprisonment served hereunder shall be credited toward service of such subsequent imprisonment.

Sec. 7. At any time, after the defendant has satisfactorily completed one-third of the original probationary period or two years of probation, whichever is the lesser, the period of probation may be reduced or terminated by the court. Upon the satisfactory fulfillment of the conditions of probation, and the expiration of the period of probation, the court, by order duly entered, shall amend or modify the original sentence imposed, if necessary, to conform to the probation period and shall discharge the defendant. In case the defendant has been convicted or has entered a plea of guilty or a plea of nolo contendere, and the court

has discharged the defendant hereunder, such court may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty, except that proof of his said conviction or plea of guilty shall be made known to the court should the defendant again be convicted of any criminal offense.

Sec. 8. (a) At any time during the period of probation the court may issue a warrant for violation of any of the conditions of the probation and cause the defendant to be arrested. Any probation officer, police officer or other office with power of arrest may arrest such defendant without a warrant upon the order of the judge of such court to be noted on the docket of the court. A probationer so arrested may be detained in the county jail or other appropriate place of detention until he can be taken before the court. Such officer shall forthwith report such arrest and detention to such court. If the defendant has not been released on bail, on motion by the defendant the court shall cause the defendant to be brought before it for a hearing within 20 days of filing of said motion, and after a hearing without a jury, may either continue, modify, or revoke the probation. The court may continue the hearing for good cause shown by either the defendant or the state. If probation is revoked, the court may proceed to dispose of the case as if there had been no probation, or if it determines that the best interests of society and the probationer would be served by a shorter term of imprisonment, reduce the term of imprisonment originally assessed to any term of imprisonment not less than the minimum prescribed for the offense of which the probationer was convicted.

(b) Any probationer who removes himself from the State of Texas without permission of the court having

jurisdiction of the case, shall be deemed and considered a fugitive from justice and shall be subject to extradition as now provided by law. No part of the time that the defendant is on probation shall be considered as any part of the time that he shall be sentenced to serve. The right of the probationer to appeal to the Court of Criminal Appeals for a review of the trial and conviction, as provided by law, shall be accorded the probationer at the time he is placed on probation. When he is notified that his probation is revoked for violation of the conditions of probation and he is called on to serve a sentence in a jail or in an institution operated by the Department of Corrections, he may appeal the revocation.

(c) In a probation revocation hearing at which it is alleged only that the probationer violated the conditions of probation by failing to pay probation fees, court costs, restitution, or reparations, the inability of the probationer to pay as ordered by the court is an affirmative defense to revocation, which the probationer must prove by a preponderance of evidence.

(c) In a probation revocation hearing at which it is alleged that the probationer violated the conditions of probation by failing to pay compensation paid to appointed counsel, probation fees, court costs, restitution, or reparations, the inability of the probationer to pay as ordered by the court is an affirmative defense to revocation, which the probationer must prove by a preponderance of evidence.

Sec. 9. If, for good and sufficient reasons, probationers desire to change their residence within the State, such transfer may be effected by application to their supervising probation officer, which transfer shall be subject to the court's consent and subject to such regulations as the court may require in the absence of a probation officer in the locality to which the probationer is transferred.

Sec. 10. (a) For the purpose of providing adequate probation services, the district judge or district judges having original jurisdiction of criminal actions in each judicial district in this state shall establish a probation office and employ, in accordance with standards set by the commission, district personnel as may be necessary to conduct presentence investigations, supervise and rehabilitate probationers, and enforce the terms and conditions of misdemeanor and felony probation. If two or more judicial districts serve a county, or a district has more than one county, one district probation department shall serve all courts and counties in the districts.

(b) Where more than one probation officer is required, the judge or judges shall appoint a chief adult probation officer or director, who, with their approval, shall appoint a sufficient number of assistants and other employees to carry on the professional, clerical, and other work of the court.

(c) To be eligible for appointment as an adult probation officer, a person who is not an adult probation officer on the effective date of this Act:

(1) must have acquired a bachelor's degree conferred by a college or university accredited by an accrediting organization recognized by the Coordinating Board, Texas College and University System; and

(A) one year of graduate study in criminology, corrections, counseling, law, social work, psychlogy, sociology, or a related field that has been approved by the Texas Adult Probation Commission; or

(B) one year of experience in full-time case work, counseling, or community or group work in a social, community, corrections, or juvenile agency that deals with offenders or disadvantaged persons that has been approved by the Texas Adult Probation Commission; and

(2) must not be otherwise disqualified by Section 31 of this article.

(d) The same person serving as a probation officer for juveniles may not be required to serve as a probation officer for adults and vice versa.

(e) Probation officers shall be furnished transportation or, alternatively, shall be entitled to an automobile allowance for use of personal automobile on official business.

(f) Personnel of the respective district probation departments shall not be deemed state employees and the responsible judge or judges of a district probation department shall negotiate a contract with the most populous county within the judicial district for all district probation department staff to participate in that county's group insurance program; retirement plan; and personnel policies with regard to vacation credit, sick leave credit, holiday schedule, credit union, jury leave, military leave, etc. It shall be the responsibility of the county or counties comprising the judicial district or geographical area served by such district probation department to provide physical facilities, equipment, and utilities for an effective and professional adult probation and adult community-based correctional service.

(g) Where a judicial district has criminal jurisdiction in two or more counties, those counties may enter into agreement that the total expenses of such facilities, equipment, and utilities to be distributed approximately in the same proportion as the population in each county bears to the total population of all those counties, according to the last preceding or any future federal census.

(h) The salaries of personnel, and other expenses essential to the adequate supervision of probationers, shall be paid from the funds of the judicial district. In all

the instances of employment of probation officers, the responsible judges are authorized to accept state-aid, grants or gifts from other political subdivisions of the state or associations and foundations, for the sole purpose of financing adequate and effective probationary programs and community-based correctional facilities other than jails or prisons in the various parts of the district. For the purposes of this Act, the municipalities of this state are specifically authorized to grant and allocate such sums of money as their respective governing bodies may approve to their appropriate county governments for the support and maintenance of effective programs. All grants, gifts, and allocations of the character and purpose described in this section shall be handled and accounted for separately from other public funds of the county.

Sec. 11. For the purpose of determining when fees are to be paid to any officer or officers, the placing of the defendant on probation shall be considered a final disposition of the case, without the necessity of waiting for the termination of the period of probation or suspension of sentence.

Sec. 11a. The provisions of Sections 6a, 10, and 11 of this Article also apply to Article 42.13.

SUPPLEMENT B

Incidence of Felony Probation and Revocation in Texas, 1975 - 1979

INCIDENCE OF FELONY PROBATION AND REVOCATION IN TEXAS, 1975 - 1979

Totals	1975	1976	1977	1978	1979
Felony Convictions	43,762	42,524	44,303	49,702	52,412
Probations Granted	23,733	22,754	24,210	28,316	33,252
Revocations Filed	7,613	8,778	8,564	9,795	11,494
Revocations Granted	3,495	3,781	3,943	4,532	5,175

SUPPLEMENT C

Cross-Jurisdictional Comparison of Probation Revocation Procedures

State	Judicial Revocation Procedure?	Arrest solely upon warrant (or equivalent prior judicial determination of probable cause prior to arrest)	Flexibility in sentencing at revocation hearing?	Preliminary hearing invariably required, absent waiver, to determine probable cause?
Alabama	Yes	No	No	No
Alaska	Yes	No	Yes	
Arizona	Yes	Yes	Yes	Yes
Arkansas	Yes	No	Yes	No
California	Yes	No	Yes	No
Colorado	Yes	No	Yes	
Connecticut	Yes	No	Yes	
Delaware	Yes	No	Yes	
Florida	Yes	No	Yes	No
Georgia	Yes	No	Yes	
Hawaii	Yes	No	Yes	
Idaho	Yes	No	Yes	
Illinois	Yes	Yes	Yes	No
Indiana	Yes	Yes	No	No
Iowa	Yes	Yes	Yes	No
Kansas	Yes	No	Yes	
Kentucky	Yes	Yes	Yes	No
Louisiana	Yes	No	No	Yes
Maine	No	No	Yes	Yes
Maryland	Yes		Yes	
Massachusetts		No	Yes	
Michigan	Yes	Yes	Yes	No
Minnesota	Yes	Yes	No	Probably
Mississippi		No	Yes	No
Missouri	Yes	No	Yes	No
Montana	Yes	No	Yes	

Per Se Right to Counsel?	Protection from improper search and seizure?	Statutory right to revocation hearing within specific time?	Protection from coerced confession?	Discretionary or mandatory right to bail?
No		No		Yes
Yes		No		
Yes		No		
Yes		Yes	Yes	
Yes	No	No		
	No	Yes		Yes
Yes		No		Yes
		No		Yes
No	No	No	No	Yes
No	No	No	No	Yes
Yes				Yes
Yes	No	Yes	No	Yes
Yes				Yes
Yes				Yes
Yes		No		Yes
Yes		No		
Yes		No	No	Yes
Yes				Yes
		Yes		
Yes		Yes	No	
Yes				
		No		
No		No		Yes
		No		

State	Judicial Revocation Procedure?	Arrest solely upon warrant (or equivalent prior judicial determination of probable cause prior to arrest)	Flexibility in sentencing at revocation hearing?	Preliminary hearing invariably required, absent waiver, to determine probable cause?
Nebraska	No		Yes	Yes
Nevada	Yes	No	No	Yes
New Hampshire	Yes	No	Yes	
New Jersey	Yes	No	Yes	
New Mexico	Yes	No	Yes	
New York	Yes	No	Yes	Yes
North Carolina	Yes	No	Yes	Probably
North Dakota	Yes	No	No	No
Ohio	Yes	No	Yes	Probably
Oklahoma	Yes	No	Yes	
Oregon	Yes	No	Yes	
Pennsylvania	Yes	No	Yes	Yes
Rhode Island	Yes	No	Yes	No
South Carolina	Yes	No	No	
South Dakota	Yes	No		
Tennessee	Yes	No	No	
Texas	Yes	Yes	Yes	No
Utah	Yes		Yes	No
Vermont	Yes	No	No	
Virginia	Yes	Yes	Yes	No
Washington	Yes	No	No	Yes
West Virginia	Yes	No	Yes	Yes
Wisconsin	No	No		
Wyoming	Probably	No	No	

Per se Right to Counsel?	Protection from improper search and seizure?	Statutory right to revocation hearing within specific time?	Protection fromcoerced confession?	Discretionary or mandatory right to bail?
Yes		No		
Yes		Yes		
Yes	No			Yes
				Yes
Yes	No	No	No	Yes
Yes				Yes
Yes				
Yes				Yes
		Yes		Yes
Yes				
		No		
	No			Yes
				Yes
			No	Yes
Yes		No		
Yes	Yes	Yes	Yes	Yes
Yes	Probably Not	Yes		Yes
Yes				
Yes				
Probably		No		
Yes				
No				
Yes		No		Yes